IN THE SUPREME COURT OF THE STATE OF ALASKA

J.P. and S.P. (Foster Parents), **Appellants,** **v.** **State of Alaska, DHSS, G.C. (Mother), W.F. (Father), J.F. (Child), and Sun'aq Tribe of Kodiak** **Appellees.**	**Supreme Court No. S-18107** **Trial No. 3AN-17-00032CN**

APPELLANTS' REPLY TO ORDER OF JULY 9, 2021

I. The Trial Court recognized the Foster Parents as Parties in the underlying case

In their respective responses, the GAL, Biological Parents, and Sun'aq Tribe made independent arguments in response to the Court's first question with one underlying theme: the Foster Parents should not be allowed to seek review here because they did not meet the technical requirement of a written motion.[1] However, each of these arguments are belied by the fact that, after an unambiguous oral request by the Foster Parents to intervene, the Superior Court allowed their involvement and disregarded the requirement to file a formal motion.[2]

During a scheduling conference on March 10, 2021, counsel for the Foster Parents requested that the Superior Court address whether the Foster Parents needed to file a motion to intervene, stating: "I want to make sure that there is a[n] agreement among the parties that I can intervene for the limited purpose of the placement hearing[.] . . . I will

[1] *See* Tribe Response at 5-7; Biological Parents' Response at 2-6; GAL's Response at 2-7.
[2] *See Log Notes*, March 10, 2021, Pre-trial scheduling Conference; 3AN-17-00032CN.

absolutely follow that up with a written motion, if necessary, but I think I understand I can file this motion [to continue] . . . and that would be sufficient for now."[3] The Court responded with "That's correct" but never instructed the undersigned to file a written motion to intervene. Thereafter, the Superior Court invited the Foster Parents to attend a confidential deposition and allowed them to file motions with the court, such as their opposition to the Sun'aq Tribe's motion to transfer,[4] motion to stay, and motion to reconsider. Both the GAL and OCS supported most of the Foster Parents motions, and the GAL filed his own opposition to the Sun'aq Tribe's motion to transfer jurisdiction while working and supporting J.P and S.P as parties and allies.

In their arguments, the opposition relies upon *State, Dep't of Hlth. & Soc. Svcs. v. Zander B.*, that the intervention of foster parents should be "the rare exception rather than the rule."[5] However, each omit the next sentence of *Zander B.*, where the Court held that "[w]e cannot conclude, however, that it is precluded as a matter of law," and went on to state that "Party" as defined by CINA Rule 2(*I*) "will include foster parents when the court properly exercises its discretion to allow them to intervene." *Id*.

While the two cases are distinguishable, this is a "rare exception" case. In Alaska, the median length of stay for children in foster care to permanent placement ranges from a mere 18.3 months to *21* months. In this case, J.F. was placed with J.P and S.P when he was only weeks old and lived with J.P and S.P in foster care for over four years (over 90%

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3 *Id*.
4 Mother's App'x at 63-64.
5 474 P.3d 1153, 1164 (Alaska 2020)

of his life). That amount of time is *more than twice* the median length of stay in a typical Alaska custody case, and more than thrice the national average.[6] Second, the child placement proceedings were similarly in progress for over four years before any representative from any Tribe intervened. The Sun'aq Tribe only moved to transfer jurisdiction a mere 10 days before J.F.'s pre-adoptive permanent placement hearing when it had been more than two years since proper notice was sent to the TNV ("Tangirnaq Native Village"). This means that TNV had notice of J.F.'s case for longer than the median length of stay for a full foster care proceeding before allegedly requesting that the Sun 'aq Tribe intervene for TNV.

Third, over the course of 4 years, the GAL,[7] OCS, and even the biological parents for most of that time, supported J.F.'s placement with J.P and S.P. Now, the GAL reverses course, claiming that the Foster Parents should not be considered parties because the foster parents and the GAL are working towards the same "best interests" which are "adequately

[6] From 2016-2019, the median length of stay prior to placement for children in foster care in Alaska ranged between 18.3-21 months. Child Welfare Outcomes Report Data by State, Alaska, U.S. Dept. of Health & Human Services: Children's Bureau, https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/alaska.html, last accessed on August 19, 2021. In contrast, the national average for 2019 was only 15.5 months. Foster Care Statistics 2019, U.S. Dept. of Health & Human Services: Child Welfare Information Gateway, https://www.childwelfare.gov/pubPDFs/foster.pdf, last accessed on August 19, 2021.

[7] It is unclear why the GAL, has now reversed its position and taken steps to oppose the Foster Parents on the issue of standing before this Court. In fact, in GAL Response, counsel emphasized the concern that allowing foster parents into child placement proceedings may entitle similar intervenors to "discovery of confidential information about the parents and children." (GAL Response at 3, n.3.) Here, however, the GAL supported the foster parents' status as intervenors in opposition to the tribe -and shared "confidential "information with the Foster Parents' counsel in that effort.

represented by an existing party."[8] In *Zander B.,* however, the Court held that a trial court may "reasonably decid[e] that foster parents have relevant evidence. . . not likely to [be] receive[d] from the existing parties," which warrants their intervention.[9] All of J.F.'s child developmental milestones from infancy to age 4.5 were met under the care and direction of J.P and S.P. Accordingly, J.P and S.P possess relevant evidence to warrant their intervention. The Superior Court implicitly recognized this and, as such, J.P and S.P are parties who have standing to file this appeal.[10]

II. The Sun'aq Tribe is not the child's tribe and the tribe abruptly changed its position on appeal

J.F is not a member of the Sun'aq Tribe. The Sun'aq Tribe intervened in the lower court only as an "agent" of the biological father's tribe, TNV.[11] This is in contravention to governing Alaska law where Congress intended to grant tribes authority over children who are members or eligible for membership in a tribe, not over Indian children from another tribe.[12] In this appeal, a March 11, 2021 letter from TNV to Sun'aq Tribe requesting assistance was produced. The unsworn letter contained no case number or caption and no reference to J.F. by name or criteria connecting the letter to J.F. (GAL Resp., Ex. 1.)

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8 (GAL Resp. at 3.)

9 *Zander B.*, 474 P.3d at 1162

10 "A superior court's 'grant or denial of a motion for permissive intervention is . . . reviewe[d] for abuse of discretion.' 'A decision constitutes abuse of discretion if it is arbitrary, capricious, manifestly unreasonable, or . . . stems from an improper motive.'" *Zander B.*, 474 P.3d at 1162. The Superior Court's decision was neither arbitrary or unreasonable, and none of the Appellees have argued as much.

11 *See* Sun'aq Tribe's Petition to Transfer Jurisdiction at 1.

12 *See* 25 U.S.C. §§ 1903(4)-(5), 1911(b)-(c), 1914.

The Sun ‘aq Tribe stated they were an agent of TNV and could take jurisdiction of J.F. because of an “agreement between tribes.” Sun’aq relies upon 25 C.F.R Sec. 23.109 (c) (1) [13] in support of this agreement. However, 25 CFR Sec. 23.109 (c) (1) is entitled “How a State court determines an Indian Child’s Tribe when the child may be a member or eligible for membership in more than one tribe,” and applies to “agreements reached” in state court proceedings where an Indian child has eligibility in two sovereign tribes competing for jurisdiction over the child; it does not apply to agreements, as here, that are between one tribe and that tribe’s own appointed agent. Also, the agreement between the TNV tribe and their agent (Sun’aq) did not involve a state court determination nor did it include any other of J.F.’s potential tribes of eligibility such as those of his Alaska Native relatives who live in Anchorage (J.F.’s mother’s tribe, J.F.’s grandmother and grandfather’s (“J.C” and “K.C”) tribes or his maternal aunt (“J.C”) and maternal uncle’s (“I.C”) tribes. The Superior Court granted automatic jurisdiction to Sun’aq without “providing an opportunity …for the tribes to determine which should be designated as the Indian child’s tribe.”[14] As a result, although J.F.’s maternal grandmother, maternal aunt and maternal uncle would testify at the state permanency hearing in support of J.P and S.P, the hearing was vacated. Importantly, J.F.’s maternal relatives are more closely related by their Alaska Native heritage, location, and relationship with J.F. than the non-Indian, half-brother of the estranged biological father in Texas who now has 4 year old James in his custody.

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[13] *See*, Sun ‘aq Tribe Memorandum at 2.

[14] See, 25 CFR §23.109 (c) (1)

Dated this 24th day of August 2021.

By: /s/ *Anne R. Helzer*
ABA #0911054